

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 11, 2009

STATE OF TENNESSEE v. CHRISTOPHER THOMAS BERRY

**Direct Appeal from the Circuit Court for Coffee County
No. 35,115 Larry Barton Stanley, Jr., Judge**

No. M2008-00635-CCA-R3-CD - Filed November 30, 2009

Defendant, Christopher Thomas Berry, was indicted for three counts of aggravated rape, a Class A felony, and one count of domestic assault, a Class A misdemeanor. On January 19, 2007, Defendant entered a plea of guilty as to one of the felony counts, to the lesser included offense of aggravated assault, a Class C felony. The trial court sentenced Defendant as a Range II, multiple offender, to eight years, with Defendant placed on probation after serving one year in confinement. As part of the negotiated plea agreement, the State entered a nolo prosequi as to the other counts of the indictment. On September 6, 2007, a probation violation warrant was issued in which the State alleged that Defendant had violated the terms of his probation by failing to pass a drug screen test. Following a revocation hearing, the trial court revoked Defendant's probation and ordered him to serve his sentence in confinement. On appeal, Defendant challenges the trial court's revocation of his probation. After a thorough review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Doug Aaron, Manchester, Tennessee, for the appellant, Christopher Thomas Berry.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Charles Michael Layne, District Attorney General; and Marla Holloway, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Revocation Hearing

Captain Pam Freeman testified that she is the jail administrator at the Coffee County Sheriff's Department. Captain Freeman said that Defendant was incarcerated in the county jail in March 2007. Captain Freeman stated that Defendant had achieved "trustee status," a special work status

that gives an inmate more freedom of movement inside and outside the jail. Captain Freeman said, however, that Defendant never left the jail's grounds.

Captain Freeman said that in March 2007, the sheriff's department, in coordination with the Coffee County drug courts, implemented a new drug screening program utilizing an optical scanning machine that detected the possible presence of drug or alcohol use. The machine was located in the jail's secured squad room on March 28, 2007. Captain Freeman said that in order to establish a base line, she randomly selected a group of trustees for testing, and Defendant was among the group.

On cross-examination, Captain Freeman acknowledged that she had not encountered any problems with Defendant before he failed the drug test. Captain Freeman estimated that seventy percent of the inmates at the Coffee County jail failed drug screen tests at some point in time.

Mike Lewis testified that he is the director of the juvenile and adult drug courts in Coffee County and a probation officer with the Tennessee Board of Probation and Parole. Mr. Lewis said that he had received training in urinalysis at the National Institute of Drug Courts as well as various seminars. Mr. Lewis said that Street Time Technologies introduced an optical scanner that scanned the astigmus response of the pupil to light and indicated whether the individual should undergo further drug testing. Mr. Lewis attended training classes provided by the company.

Mr. Lewis stated that on March 28, 2007, the machine was installed in the sheriff's department. Mr. Lewis explained that the machine does three initial scans of an individual to establish a base line, and Defendant was one of those chosen to undergo testing. On March 29, 2007, Mr. Lewis returned to the sheriff's department and asked Defendant to submit to an optical scan again. Defendant responded, "Okay." Mr. Lewis said that the testing results indicated that Defendant and another inmate should undergo uranalysis. Mr. Lewis put on rubber gloves, handed Defendant a cup, and watched him urinate. Mr. Lewis said that Defendant failed the initial "field" urine test, although the other inmate's test results were negative for drugs. Mr. Lewis stated that Defendant's urine sample was tested again by a uranalysis machine which confirmed the positive test results.

On cross-examination, Mr. Lewis said that he took Defendant's urine sample for further testing approximately two hours after the first test. Mr. Lewis said that during that time, Defendant's sample was either on his desk or on a table in the room where the uranalysis machine was maintained. Mr. Lewis acknowledged that the room was accessible to those in the courtroom or the hallway. Mr. Lewis said that no one was in the room when he dropped off Defendant's urine sample, and the door to the room was open.

Gerald Sain, the coordinator of community service and drug screening for Coffee County, testified that he was certified to operate the Dade Behring Viva-Jr drug screen machine in early March 2007. Mr. Sain stated that he calibrated the machine once a week. Each day, Mr. Sain also ran a control sample through the machine before he ran the day's batch of urine samples. Mr. Sain explained that the control item was a sample provided by the company that had the cut off level

established by a certified substance. Mr. Sain said that he calibrated the machine on Monday, March 26, 2007, and ran the control sample on the morning of March 29, 2007, before he tested Defendant's urine sample. Mr. Sain stated that Defendant's urine sample tested positive for marijuana and opiates.

II. Analysis

On appeal, Defendant argues that the trial court abused its discretion in revoking his probation because the State did not comply with the provisions of Tennessee Code Annotated section 40-35-311(c)(1). Defendant also contends that Mr. Sain's testimony was "nothing more than hearsay unsubstantiated by any document." The State contends that Defendant has raised the issue of non-compliance with section 40-35-311(c)(1) for the first time on appeal, and the issue is thus waived. Alternatively, the State argues that section 40-35-311(c)(1) only applies when the lab technician conducting the drug screen test does not testify at the hearing.

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the defendant has violated a condition of probation. T.C.A. §§ 40-35-310, -311. The decision to revoke probation rests within the sound discretion of the trial court. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Revocation of probation is subject to an abuse of discretion standard of review, rather than a de novo standard. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). Discretion is abused only if the record contains no substantial evidence to support the trial court's conclusion that a violation of probation or Community Corrections sentence has occurred. Id.; State v. Gregory, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997). Proof of a violation need not be established beyond a reasonable doubt, and the evidence need only show that the trial judge exercised a conscientious and intelligent judgment, rather than acted arbitrarily. Gregory, 946 S.W.2d at 832; State v. Leach, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995).

At the revocation hearing, Defendant did not raise an issue as to the State's compliance or non-compliance with section 40-35-311 before the trial court. An issue raised for the first time on appeal is generally waived. State v. Reams, 265 S.W.3d 423, 431 (Tenn. Crim. App. 2007) (citing State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996)). Nonetheless, possible waiver aside, Defendant is not entitled to relief on this issue.

Tennessee Code Annotated section 40-35-311(c)(1) sets out the requirements the State must follow before introducing a laboratory report regarding a drug test if the lab technician who performed the test is not called to testify at the probation revocation hearing. The statute requires that an affidavit containing specific information must accompany the report if the technician does not testify. In the instant case, however, the lab technician was present and did testify, and thus the provisions of Tennessee Code Annotated section 40-35-311(c)(1) are not applicable. See State v. John Patrick Nash, No. M2006-00357-CCA-R3-CD, 2007 WL 258444, at *3 (Tenn. Crim. App., at Nashville, Jan. 30, 2007), perm. to appeal denied (Tenn. May 14, 2007).

Mr. Sain testified that he was certified to operate the Dade Behring Viva-Jr drug screen machine by the manufacturer, that he calibrated the machine weekly, and that he ran a control sample through the testing process each day before testing urine samples which was done prior to testing Defendant's urine sample. Mr. Sain testified that he followed normal operating procedures, and Defendant's urine sample tested positive for opiates and marijuana.

The trial court stated:

I do find that the gentleman who performed the drug test to be trustworthy and that his testimony was very credible. I don't think the document itself is necessary based on his testimony, that it was really unimpeached and, as I said, credible.

Based on the foregoing, we conclude that the trial court did not abuse its discretion in revoking Defendant's probation and ordering him to serve the balance of his sentence in confinement.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

THOMAS T. WOODALL, JUDGE